



# HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

## INFORMAL ADVISORY OPINION NO. 2004-2

The Honorable Linda Lingle  
Governor  
State Capitol, 5<sup>th</sup> Floor  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Governor Lingle:

On April 12, 2004, the Hawaii State Ethics Commission ("Commission") received a formal, sworn charge filed against you by Ms. Faith Tomoyasu, a public school educator. In her charge, Ms. Tomoyasu alleged that you had violated the State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS"), by using state employees and state resources on behalf of a private nonprofit corporation known as the "Citizens Achieving Reform in Education" ("CARE"). CARE had originally been formed by you as an advisory group, but became a nonprofit corporation on December 31, 2003. CARE then filed with the Internal Revenue Service for status as a 501(C)(4) organization, which would allow the organization to lobby.

On April 14, 2004, the Hawaii State Ethics Commission received a second formal, sworn charge filed against you by Alexander C. Santiago, the Chair of the Democratic Party of Hawaii. Mr. Santiago essentially raised the same allegations in his formal charge as did Ms. Tomoyasu.

The facts of this case are not in dispute. CARE did in fact file with the State on December 31, 2003, to incorporate as a nonprofit corporation. On its filing, CARE listed as its address the Office of the Governor. CARE then applied to the Internal Revenue Service for status as a 501(C)(4) organization, which would allow it to lobby.

It is also undisputed that your Chief of Staff, Mr. Bob Awana, performed work on state time, as well as in your office, in support of CARE. A number of other state employees in your office also spent state time performing work for CARE. This work included maintaining the web site for CARE on the State's web site, and soliciting donations for CARE. CARE also used a state telephone number in your office as its telephone number, and CARE's e-mail contact was a state employee in your office. CARE was also allowed to use a fax number in your office.

In February, CARE registered with the State Campaign Spending Commission as a political action committee. There is no doubt, therefore, that from December 31, 2003, CARE functioned as a private nonprofit entity.

The State Ethics Code prohibits state resources from being used in a preferential manner for private business purposes. HRS section 84-3 defines a "business" to include a corporation, whether or not operated for profit. For purposes of the State Ethics Code, CARE was a business, and, as such, could not be accorded any unwarranted privileges or unwarranted use of state resources.

The Fair Treatment section of the State Ethics Code, HRS section 84-13, prohibits state officials from using their positions to give any entity or business any unwarranted advantage or preferential treatment. This prohibition includes the use of state time, equipment, or other facilities for private business purposes. The prohibition on the use of state resources for private business purposes appears in HRS section 84-13(3). The Fair Treatment section, in its entirety, reads as follows:

**§ 84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

The State Ethics Code clearly prohibits state resources from being used in a preferential manner to support a private entity or business. For this reason, state resources could not be used to support CARE. The use of state resources to support CARE constitutes violations of HRS sections 84-13 and 84-13(3) of the State Ethics Code. The Hawaii State Ethics Commission believes, therefore, that you violated HRS sections

84-13 and 84-13(3) by allowing state resources to be used to support CARE once CARE became a private entity.

That being said, the Hawaii State Ethics Commission strongly commends you for your full cooperation in addressing and resolving this matter. In the following paragraphs, the Commission will set forth the steps you have taken to responsibly address this case.

After the first formal charge was filed on April 12, 2004, the Hawaii State Ethics Commission's executive director met the next day with your Chief of Staff, Mr. Bob Awana, and his assistant. Mr. Awana had requested the meeting with the executive director. The executive director discussed the case with Mr. Awana for approximately two hours, and informed Mr. Awana that there appeared to be an apparent violation of the State Ethics Code, and therefore the use of state resources for CARE should be terminated. The following day, you took this action, and the use of state resources in support of CARE stopped.

When formal charges are filed against a state official or state employee, the State Ethics Code requires that the state official or state employee be given an opportunity to respond to the charges. Thus, you were given an opportunity to respond to the charges by way of a written answer. You requested an extension to May 30, 2004, in which to respond to the charges. This extension was granted to June 1, 2004, since May 30 fell on a Sunday, and May 31 was an official holiday.

You filed your answer to the charges on May 28, 2004. In dealing with the formal charges filed against you, you retained attorney Kenneth S. Robbins to represent you in this matter. Mr. Robbins, after consultation with you, submitted your answer on your behalf.

On May 7, 2004, Mr. Robbins contacted the Commission's executive director, and the executive director and Mr. Robbins discussed the case at length. The executive director discussed with Mr. Robbins ways in which this case might be resolved, and Mr. Robbins conveyed this information to you.

The Hawaii State Ethics Commission has reviewed your answer to the formal charges, and the actions that you have taken to address this case, and concludes that the actions you have taken to address this case are sufficient for the Commission to terminate any further proceedings. HRS section 84-31(b) allows the Commission to issue an informal advisory opinion in response to, and in order to dispose of, a formal charge filed with the Commission. The Commission has taken this action in this case, and believes that no further proceedings are warranted.

The Hawaii State Ethics Commission believes that you have responsibly addressed its concerns in this case. The Commission notes that your first action was to end the use of state resources for the benefit of CARE immediately after being informed that there was a probable violation of the State Ethics Code. In your answer, through your attorney, you

state that you regret not seeking the advice of the Commission before utilizing state resources for CARE. You apologized both to the Hawaii State Ethics Commission and to the people of Hawaii for the use of the state resources for CARE, and acknowledged that you had violated the State Ethics Code by using state resources for CARE once it became a private entity.

Furthermore, you promptly obtained restitution from CARE for the state resources that were utilized in support of CARE. Mr. Awana calculated the state time used in support of CARE, as well as the square footage of state office space, and the cost of other state resources that were utilized in support of CARE. You thus submitted with your answer a check from CARE in the amount of \$29,843.33 to be paid to the State to reimburse the State for the state resources CARE received. The amount of this restitution appears accurate to the Hawaii State Ethics Commission. The Commission thus believes that the restitution you have tendered is appropriate.

Because you have acknowledged infractions of the State Ethics Code, have apologized, have obtained restitution, and through your attorney have consented that the informal advisory opinion in this case along with your answer and a copy of the check are to be made public, the Hawaii State Ethics Commission believes that these measures taken by you in a forthright and expeditious manner are to be commended, and that further proceedings are not warranted under these circumstances. The Commission notes that you have acted responsibly during the course of this case, and furthermore, Mr. Awana and your attorney, Mr. Robbins, have been forthright in their dealings with the Commission on your behalf.

The Commission notes that in your answer, you set forth mitigating circumstances indicating that your use of state resources for CARE was done, to your mind, in order to serve the public good. You have stated that you were unaware of any ethics violations, and that your intentions were certainly not to violate the State Ethics Code, but to serve the public. The state resources that you used for CARE were used openly, and thus it appears to the Hawaii State Ethics Commission that there was no knowing attempt on your part to violate the State Ethics Code.

The Hawaii State Ethics Commission, however, believes that you should have perceived an ethics issue with regard to the use of state resources for CARE once it became a private entity – especially one that lobbies and exists as a political action committee. The Commission hopes in the future that you more fully scrutinize such matters.

In closing, the Hawaii State Ethics Commission again commends you for your prompt and responsible actions taken in addressing this case. Because you have acknowledged that you have violated the State Ethics Code, have apologized, have obtained restitution for the State, have indicated your regret for your actions, and have stated that this opinion may be made a matter of public record, along with your answer and the check from CARE, the Commission believes that any further action by the

Commission is unnecessary and would constitute a waste of taxpayer dollars and Commission resources.

For the record, we are attaching your answer to this informal advisory opinion as Exhibit A, and the copy of the check for restitution as Exhibit B. In accordance with your instructions conveyed through your attorney, this informal advisory opinion and the attachments will be made a matter of public record.

Dated: Honolulu, Hawaii, June 3, 2004.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson  
Dawn Suyenaga, Vice Chairperson  
Nadine Y. Ando, Commissioner  
Eloise Lee, Commissioner  
Carl Morton, M.D., Commissioner

KENNETH S. ROBBINS  
LEIGHTON M. HARA

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FED. I.D. NO. 99-0175383

May 28, 2004

VIA HAND DELIVERY

Daniel J. Mollway, Esq.  
Executive Director and General Counsel  
Hawaii State Ethics Commission  
1001 Bishop Street  
ASB Tower 970  
Honolulu, Hawaii 96813

STATE OF HAWAII  
STATE ETHICS COMMISSION

04 MAY 28 P1:03

RECEIVED

Re: Complaints filed by Faith Tomoyasu and Alexander Santiago

Dear Mr. Mollway:

Governor Linda Lingle has retained me, at her individual expense, to represent her with respect to the above-referenced complaints.

Please accept our thanks for your extending the deadline within which to respond to June 1, 2004. The extension of time has allowed me to meet at length with Governor Lingle and her Chief of Staff, Bob Awana. In our discussions, we have reviewed the State Ethics Code, all applicable statutes, rules, regulations and for that matter, treatises and judicial decisions interpreting the United States Constitution, with respect to government proscribed speech and government subsidies for speech.

I can state without equivocation that Governor Lingle and Mr. Awana regret very much the fact that they did not seek the advice of legal counsel before establishing Citizens Achieving Reform in Education (CARE) as a 501(C)(4) non-profit entity on December 31, 2003 and utilizing state resources thereafter in connection with the purposes of CARE. Governor Lingle and Mr. Awana are fully informed and advised regarding the proscriptions in using state resources for the purposes of a non-profit entity, particularly one, which seeks legislative reform in any area or endeavor. To say that they regret this is an understatement.

Thus, before proceeding any further with this Response, I express to you, at the request of Governor Lingle, her sincere apology to you, to the Commission and, once the Ethics Commission

**EXHIBIT** A

Daniel J. Mollway, Esq.  
Executive Director and General Counsel  
May 28, 2004  
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work has been concluded, to the people of the state of Hawaii. In this connection, I have advised Governor Lingle and Mr. Awana to refrain from making any public statements with respect to the ethics complaints so as not to appear to be attempting to influence the State Ethics Commission's deliberations in this matter.

The operation of CARE in the Governor's office has ended. State resources, including state employees, are no longer assisting CARE, while serving in their capacities as employees of the state of Hawaii. All activities of CARE have been physically moved out of the Governor's office and into a private setting.

Further, Mr. Awana, at my request, has made a list of all state employees who worked on behalf of CARE until the point in time when CARE's operations were moved out of the Governor's office. He has calculated the total compensation of each such employee, paid by the state of Hawaii, for the period of CARE's operation in the Governor's office. Further, Mr. Awana has calculated the percentage of time each such employee worked on behalf of CARE while serving in their capacity of state employees. Mr. Awana has also calculated, on a prorata basis, the total amount of square footage of state office space utilized by state employees, while working for the purposes of CARE. Mr. Awana has also reviewed whatever hardware and supplies which may have been state property used in connection with the purposes of CARE for the period that CARE functioned within the Governor's office.

As a result of Mr. Awana's calculations, a total sum of \$29,843.33 reflects the monetary value of all state resources utilized in connection with CARE, while that organization worked out of the Governor's office. A check in that sum, payable to the Director of Finance of the state of Hawaii, is enclosed with this Response as restitution for the use of those state resources.

Having acknowledged infractions and having expressed a most heartfelt apology and tendering to the Director of Finance of the state of Hawaii a sum which represents the total value of state resources used by CARE, while functioning in the Governor's office, I now, if I may, set forth what I hope will be received by the State Ethics Commission as mitigating circumstances in connection with the above-referenced complaints.

Daniel J. Mollway, Esq.  
Executive Director and General Counsel  
May 28, 2004  
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Without disputing the importance of the State Ethics Code and the seriousness of utilizing state resources for what was technically a private purpose, the Governor and her staff perceived those circumstances at the time somewhat differently. Few in Hawaii can doubt that the Governor has made it well known that education reform in the state of Hawaii is an issue which she believes has not been adequately addressed and is of utmost importance to the students within the state public school system. A group of 25 bi-partisan members of the community coalesced with the goal to develop a plan to improve Hawaii's public education system. To accomplish that goal, numerous meetings were conducted within the group as well as conducting many community gatherings throughout the state to obtain input from the general public. The findings and conclusions of the CARE Advisory Group were published in a CARE Report and presented to the Governor.

It then became evident to continue the Governor's public education reform initiatives, it would be necessary to solicit the public's help in providing contributions to defray the cost of on-going expenses. It was at this point that the advisory group, CARE, was formerly incorporated as a 501(C)(4) non-profit entity on December 31, 2003. Its primary purpose was to serve as a vehicle which could receive contributions from the public to defray the expenses of that effort.

The Governor's office address was used in the incorporation papers. The Governor, her staff and the advisory group of CARE were utterly transparent in utilizing the Governor's office to promote CARE's initiatives. Incorrectly, Governor Lingle and her staff were of the opinion that CARE, as a 501(C)(4) non-profit entity was actually serving the public good, rather than the public serving CARE in its capacity as a 501(C)(4) non-profit private entity.

As a result of my discussions with the Governor and her staff, the Governor is now fully apprised that, although in her heart and mind CARE as a private 501(C)(4) non-profit was serving the public good, that was not technically correct. The Governor and her staff now understand that state resources were being utilized to assist in promoting the purposes of CARE and, thus, constituted an ethics violation.



Daniel J. Mollway, Esq.  
Executive Director and General Counsel  
May 28, 2004  
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Although there was an ethics violation, the fact that the Governor and her staff did not intentionally commit that violation and were unaware of that fact is made evident by the transparency with which CARE operated out of the Governor's office. As mentioned above, CARE used the Governor's office address. When funds were solicited, it was requested that those contributions be sent to CARE via the Governor's address. The use of state employees was open and obvious. Mr. Awana, when questioned about CARE by both Honolulu newspapers, was forthright in acknowledging the operation of CARE within the Governor's office. In short, the lack of intent to willfully violate the State Ethics Code is evidenced by the openness with which state resources were utilized. As I have reviewed, discussed and evaluated these circumstances with the Governor and her staff, it is obvious to me that the Governor's intentions were good. As I view the situation, any violation of the Ethics Code was not intentional. In my opinion, unbiased and objective reviewers of those circumstances would concur.

With the Governor's instruction, I forthrightly acknowledge, and apologize on her behalf for, the violation of the Ethics Code. With the tendering of the enclosed check, as restitution for the state resources which were utilized, with the explanation which I have set forth above and in view of the fact that I am charging Governor Lingle, as I would any other client, for my services in connection with these matters, I respectfully submit that the State Ethics Commission need not proceed into informal or formal hearings with respect to these violations. This is not to say that Governor Lingle or any member of her staff would not willingly cooperate with your office and the State Ethics Commission, if additional cooperation or explanation is requested.

I thank you and the members of the Hawaii State Ethics Commission for giving Governor Lingle this opportunity to respond to the ethics complaints referred to above. Having discussed these matters at length with Governor Lingle, I can assure you and the Hawaii State Ethics Commission that Governor Lingle will exercise every reasonable precaution to assure that she and her staff will not violate the State Ethics Code again.

Daniel J. Mollway, Esq.  
Executive Director and General Counsel  
May 28, 2004  
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We look forward to your response.

Very truly yours,

Kenneth S. Robbins

Enclosure

KSR:04-0344

cc: Governor Linda Lingle [via hand delivery]

Citizens Achieving Reform in Education  
1040 Noio Street  
Honolulu, HI 96816

Date: 5/27/04

105

PAY TO THE ORDER OF Director of Finance \$ 29,843.33

Twenty-nine thousand eight hundred forty- DOLLARS

**h Bank of Hawaii**  
Main Branch  
Honolulu, Hawaii 96813

three dollars and 33/100

MEMO Inv. #2004-10

MP

**EXHIBIT** B